United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

Original with Affidavit of Mailing

75-2088

To be argued by
EDWARD S. RUDOFSKY

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-2088

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P/S

MEIR KAHANE,
Petitioner-Appellee,

—against—

UNITED STATES OF AMERICA,
Respondent-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

—against—

MEIR KAHANE,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

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BRIEF FOR THE APPELLANT

Preliminary Statement

This is an appeal from a memorandum decision and order of the United States District Court for the Eastern District of New York (Weinstein, *J.*) entered May 7, 1975 requiring the Federal Bureau of Prisons to provide appellee with kosher meals during the period of his incarceration. Jurisdiction to hear and determine this appeal is vested in this Court by 28 U.S.C. § 1291.[1]

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[1] The order of the district court carries on its face the caption of both the civil action purportedly brought by appellee pursuant to 28 U.S.C. § 2255 (75 C 624) as well as the caption of

[Footnote continued on following page]

Issues Presented on Appeal

I. Whether the sentencing district court has jurisdiction to hear and determine a claim by an Orthodox Jewish prisoner that he must be provided with kosher meals during the period of his incarceration as a matter of constitutional right? The court below answered in the affirmative.

II. Whether the policy of the Federal Bureau of Prisons not to provide Orthodox Jewish prisoners with imported kosher meals on a daily basis during the period of their incarceration is a violation of their constitutional rights? The court below answered in the affirmative.

Statement of the Case

In 1971, appellee pled guilty to an indictment (71 Cr. 479, E.D.N.Y.) charging him with one count of conspiring to make, receive and possess explosive bombs, incendiary devices, pipe bombs and other destructive devices in violation of 18 U.S.C. § 371 (A. 14-19). Judge Weinstein of the District Court sentenced appellee to five years' imprisonment (the term of incarceration suspended), five years' probation and a $5,000 fine. Specifically conditioning the term of probation, Judge Weinstein expressly warned appellee to avoid any direct or indirect involvement with weapons and explosives, and made it clear that this condition applied anywhere in the world Kahane's travels might take him, including, by specific reference, the State of Israel (A. 161).

Ignoring the district court's warning, appellee, while in Israel, engaged in the smuggling of weapons to this country and repeatedly encouraged his followers to bomb foreign

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the underlying criminal case (71 CR 479). Out of caution, the notice of appeal filed by the United States tracks that dual caption, as does the brief herein. The decision of the district court, however, clearly bases the relief granted appellee upon § 2255 (A. 159, 177-183), or alternatively, 28 U.S.C. § 1361. Accordingly, jurisdiction of this Court is invoked pursuant to § 1291.

embassies throughout the world. He was arrested by the Israeli authorities, tried, and ultimately convicted of violating the Israeli criminal code as a result of these activities. Upon his release from Israeli custody, Kahane returned to this country, where he was charged with violating probation (A. 161-162).

Appellee appeared before Judge Weinstein on February 21, 1975 to answer the probation violation charges lodged against him. After some initial skirmishing, he pled guilty to the violation charged (18 U.S.C. § 3653). The district court, rejecting extensive pleas by counsel, and noting that the probation system would be severely undermined if violence by a probationer were condoned (A. 162), sentenced appellee to one year in prison (A. 20). Execution of the sentence was stayed until February 26, 1975 to give appellee an opportunity to put his personal affairs in order (*id.*).

Appellee thereafter requested a further stay of execution of the sentence to enable him to complete a previously scheduled two week long lecture tour; this request was granted, the territorial limits of bail extended, and execution of the sentence was stayed until March 18, 1975.

Just before this stay expired, however, counsel for appellee orally applied to the district court for permission to submit an order requiring the Government to maintain appellee in New York City for the Passover holiday period and granting appellee certain other relief (A. 23-25). In response to this application, the district court entered an amended judgment of commitment (A. 33) directing that appellee be remanded to the Federal Community Treatment Center in Manhattan through the Passover holiday and that he be allowed "out" for all meals and religious services during the holiday period.

Shortly after commencing his residence at the Community Treatment Center, appellee proffered yet another

application to the district court, seeking specific permission to depart the Center from March 26 through March 29, 1975 and April 1 through April 3, 1975 to enable him to participate in the Passover holiday festivities and religious services. The requested leave was granted by the district court on March 25, 1975 and appellee was furloughed to the custody of his attorney for the periods involved (A. 34-35). The district court directed that appellee be returned to the Center on April 3, 1975 to await transfer to a correctional institution on Monday, April 7, 1975.

Three days prior to the scheduled transfer date, however, appellee's attorney informed the district court that the Bureau of Prisons had advised him, in response to his inquiry on appellee's behalf, that, in keeping with long standing policies, strictly kosher meals would not be imported and specially provided to appellee on a daily basis during the period of his incarceration (A. 39-44). The district court, determining that appellee's first amendment rights were at stake, ordered that appellee continue to reside at the Community Treatment Center and that he be released for several hours, three times daily, to eat and pray (A. 33).

On April 14, 1975, appellee filed a motion (A. 45-47) and supporting memorandum seeking a court order compelling the provision of kosher meals while incarcerated. Thereafter, on April 18, 1975, the United States Attorney forwarded a letter summarizing the position of the Government concerning appellee's then pending motion and the validity of prior court orders *vis-à-vis* appellee's religious dietary requirements (A. 52-56). It was the Government's contention, as perceived from Kahane's statements to the press (see A. 49-51), that appellee's motion of April 14, 1975 was merely a masked effort to prolong his continued "incarceration" at the Community Treatment Center, thereby enabling appellee to continue his active leadership of the Jewish Defense League (A. 52). The Government pointed out that under the then outstanding court order (and standard Community Treatment Center policies), Kahane

traveled unaccompanied to the lower east side of Manhattan to eat, and, during these "meal" periods, was unjustifiably free to engage in whatever political activities and organizational efforts he desired.[2]

The United States further asserted in its letter of April 18, 1975 that it could not accede to the propriety of the amended commiment order (as further amended by the district court on April 4, 1975) inasmuch as the sentencing court, in the first instance, was without jurisdiction to direct the Attorney General to place a prisoner at a particular situs or to order the Bureau of Prisons to provide a particular diet during the period of incarceration (A. 53-55). The United States, therefore, requested that the district court vacate its April 4, 1975 order and, by implication, reinstate its original judgment of February 21, 1975 so as to allow the transfer of appellee to a penal institution in accordance with usual procedures.

The district court held a "hearing" on the entire matter on April 24, 1975. At the very outset of that proceeding the Government again took exception to the district court's

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[2] It should be noted that the court ordered place of confinement, the Federal Community Treatment Center, is a "half way house" facility that serves to ease the process of reorientation into general society which federal prisoners face upon their release from more traditional penal institutions. (The Center also serves as a place of "confinement" for probationers committed pursuant to 18 U.S.C. § 3651). Since the Center seeks to encourage the growth of responsibility and independence in former inmates, restraint and strict regulation are, obviously, inapposite to the desired end. The Center, as expected, could not and did not depart from its usual practice of allowing residents to go out, unrestrained, when appellee was specifically remanded by the Court to its custody, even though his incarceration there was most unique in that he was neither a § 3651 probationer nor an inmate who had already served the majority of his sentence in a federal penal institution (see affidavit of July 31, 1975 submitted by Matthew Walsh, Center Director, in connection with the Government's motion for summary reversal in this case). See n. 3, *infra*.

assuming jurisdiction over appellee's dietary claim. Over the Government's objection, however, the district court noted that "at the very least" it was authorized to hold a hearing "for the purposes of recommendation" (A. 66). Appellee thereupon called several "witnesses", among them three rabbis, who advised the Court as to their opinion of the significance and requirements of the Jewish dietary laws. The Government stood upon its continuing objection to the proceedings (premised upon the sentencing court's lack of jurisdiction to enter orders affecting the execution of sentence) and neither called "witnesses" nor "cross-examined" those called by appellee (except for two questions of Mr. Schreiber (A. 115).

At the conclusion of this "testimony", however, the Assistant United States Attorney again raised the question of whether the Court had a proper jurisdictional basis to issue its earlier orders or similar future mandates. Judge Weinstein suggested that appellee file a separate civil action under 28 U.S.C. § 2255 (A. 140). When counsel for appellee countered with the proposal that the papers filed by him on appellee's behalf in the criminal proceeding should be amended to reflect a § 2255 civil action, the Court responded by advising counsel that separate civil papers had to be filed, and further suggested that counsel ask the clerk of the district court to mark the papers as a related case (A. 141-142).

The next day, April 25, appellee, through counsel, filed an application with the district court captioned "Meir Kahane—against—United States of America" seeking a court order compelling the Government to provide Kahane with strictly kosher meals during his incarceration pursuant to 18 U.S.C. § 2255 (A. 151-158). Appellee paid a separate docketing fee, and a civil docket number was assigned to the matter. A complaint, however, was never filed, and process did not issue. Accordingly, there was no service of any papers on, or notice that the "action" had been com-

menced to, the Attorney General of the United States, the Federal Bureau of Prisons, or any individual respondent.

Judge Weinstein, by a Memorandum and Order dated May 7, 1975 granted the relief requested in appellee's § 2255 application and ordered the Bureau of Prisons to fully accommodate Kahane's religious requirements and to protect his "constitutional rights" as an inmate by supplementing the regular prison fare provided him with imported kosher meals while incarcerated (A. 199). In so ordering, the district court relied on several of its findings of fact drawn from the testimony at the April 24, 1975 hearing, to wit: (1) that the requirements of the kashruth (Jewish dietary laws) are central to Jewish orthodoxy and incarceration does not relieve the follower from observing these religious dietary requirements; (2) that appellee would have to approach death through starvation before partaking in non-kosher food; (3) that the Bureau of Prisons had and would continue to refuse to provide appellee with imported kosher foods; and (4) that the importation of foods meeting the requirements of Jewish orthodoxy does not create significant administrative difficulties in prisons (A. 169-170). Asserting that an individual does not summarily lose first amendment rights as a result of his incarceration (A. 164), the Court held that only a "compelling state interest" underlied by a "seriously disruptive adminstrative burden" could justify deprivation of those rights protected by the first amendment (A. 191), and that any such curtailment must be accomplished by "the least drastic means" (A. 190). It is from this order that the Government appeals.

ARGUMENT

POINT I

The court below lacked subject matter jurisdiction over appellee's petition for relief herein.

On July 25, 1975, this Court (Gibbons, Gurfein and Meskill, *CJJ.*) decided *United States* v. *Huss and Smilow,*

— F.2d. —, Slip. Op. 5121 (2d Cir., July 25, 1975), holding that the sentencing district court does not have jurisdiction to hear and determine a prisoner's claim that he or she is to be provided with kosher meals while incarcerated, except perhaps under 28 U.S.C. § 1361 in a proper case where a genuine § 1361 action has been commenced and there is a "mandamus respondent" over whom the district court has jurisdiction.

The captioned appeal presents an identical claim by a federal prisoner to a sentencing judge for the provision of kosher meals. It is submitted that *Huss and Smilow, supra,* totally disposes of this appeal and mandates reversal of the District Court on the controlling issue of jurisdiction.[3]

Appellee, under the umbrella of an application "pursuant to 28 U.S.C. § 2255", petitioned the Honorable Jack B. Weinstein, U.S.D.J., the sentencing judge in this case, for an order compelling the Federal Bureau of Prisons to accommodate appellee's particular religious dietary requirements during the period of his incarceration by importing frozen kosher meals. The application was made in writing, and the district court, rejecting the Government's contention that the sentencing court lacked the jurisdiction to do so, held an evidentiary hearing, and granted the requested relief *in toto.*

In *United States* v. *Huss and Smilow, supra,* at 5122, the Court stated the case as follows (in pertinent part):

> The defendants, Richard Huss and Jeffrey Smilow, appeal from an order . . . denying their application for an order directing the Federal Bureau

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[3] On August 4, 1975, the United States moved this Court to summarily reverse the district court's Order of May 7, 1975 on the authority of the intervening decision in *United States* v. *Huss and Smilow* — F.2d —, Slip Op. 5121 (2d Cir., July 25, 1975), holding that the sentencing district court lacks jurisdiction to condition the terms of incarceration by ordering the Buearu of Prisons to provide an inmate with imported kosher food while incarcerated. The motion was argued before this Court (Oakes, VanGrafeiland, and Meskill, *CJJ.*) on August 12, 1975. Decision was reserved.

> of Prisons to provide them with meals meeting the Orthodox Jewish Kosher dietary laws during their incarceration. . . . The application was made to the sentencing judge in the district court by a written motion. . . . The district court . . . held an evidentiary hearing and rejected defendants' claims on the merits.

The statement of the case concluded:

> Because we find that the district court lacked jurisdiction over the subject matter of the application, or personal jurisdiction over an appropriate civil respondent, we vacate the order appealed from without prejudice to its renewal in an appropriate form.

In reaching this conclusion, the *Huss and Smilow* panel (which was unquestionably aware of Judge Weinstein's opinion in *Kahane* —see n. 6 of the *Huss and Smilow* opinion, at 5126), fully analyzed each of the "bases of jurisdiction" proferred in both that case and *Kahane*. Suffice it to say for purposes of the instant appeal that the *Huss and Smilow* decision eliminated as possible jurisdictional bases all but one of those relied upon by Judge Weinstein herein: 28 U.S.C. § 1361.[4] It is thus necessary for the Government to demonstrate only that the district court, as a matter of law, cannot have been exercising § 1361 jurisdiction.

It is absolutely clear from the record that a civil action under § 1361 was never commenced herein. When appellee, through his counsel, filed his § 2255 application with the district court, a separate docketing fee was paid and a civil

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[4] It should be remembered that § 1361 jurisdiction was not found to be present in *Huss and Smilow*, but that the panel therein quite properly did not rule on whether the "civil action" which appellee apparently attempted to institute herein, could be construed as a genuine § 1361 action. Slip Op. at 5134, n. 15. For the reasons set forth in the text *infra*, we submit that appellee's § 2255 application cannot, as a matter of law, be so construed.

docket number assigned. The payment of a docket fee, and the mere stamping of a docket number on a document proffered to the Clerk of the Court, are not, however, the benchmarks of the commencement of a civil action in a Federal District Court.

Rule 3 of the Federal Rules of Civil Procedure provides that a civil action is commenced by the filing of a complaint with the district court. Rule 4, F.R.C.P. provides that upon the filing of a complaint (or a document construed as such) " . . . the Clerk shall forthwith issue a summons and deliver it for service to the Marshal" [5] and that the summons and complaint be served on the defendant(s) by the Marshal.[6] When, as in the instant "action", the defendant is the United States, the rules specifically provide that service shall be made "by delivering a copy of the summons and complaint to the United States Attorney for the district in which the action is brought . . . and by sending a copy of the summons and complaint by registered or certified mail to the Attorney General of the United States. . . ." [7] Even assuming, *arguendo,* that appellee's § 2255 application were to be construed as the equivalent of a complaint for the purposes of analyzing service under Rule 4, it is obvious from the record that no summons was ever issued herein and that the involved papers were never served upon the Attorney General. *A fortiorari,* no civil action was ever commenced against the United States, *Messenger* v. *United States,* 231 F.2d 328 (2d Cir. 1956), much less a "genuine" action pursuant to 28 U.S.C. § 1361.

Moreover, assuming, for the purposes of discussion, that appellee somehow commenced a civil action below, it is undeniable that that action, on its face, was brought under 28 U.S.C. § 2255 (at the specific suggestion of the trial judge). This Court, however, expressly held in *Huss and*

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[5] F.R. Civ. P. 4(a).
[6] F.R. Civ. P. 4(c, d).
[7] F.R. Civ. P. 4(d)(4).

Smilow that § 2255 is an inadequate basis for jurisdiction in a case such as this. Slip Op. at 5131. Therefore, assuming further that the § 2255 application is viewed by this Court as stating a § 1361 cause of action (which would require an extraordinary construction of the application), it is necessary only to inquire as to whether there was a mandamus respondent before the district court which would give it jurisdiction over a "genuine § 1361 lawsuit". Without doubt, this inquiry must be answered in the negative.

The United States of America, the named but unserved defendant below, is not a proper mandamus respondent and the cases clearly hold that the mere naming of the United States as a mandamus respondent is insufficient to confer jurisdiction on the district court. *E.g., Hospoder* v. *United States,* 209 F.2d 427, 429 (3rd Cir. 1953); *McCune* v. *United States,* 374 F. Supp. 946, 948 (S.D.N.Y. 1974). Only officers, employees or agencies of the United States are proper mandamus respondents. 28 U.S.C. § 1361; *Akin Mobile Homes, Inc.* v. *Secretary of H.U.D.,* 354 F. Supp. 1036, 1038 n. 3 (S.D. Miss. 1972), *aff'd on other grounds,* 475 F.2d 1261 (5th Cir. 1973); *McCune, supra.* None was named herein; none was served. Thus, even if a civil action had been commenced, it could not have been a "genuine" § 1361 lawsuit, and the Court below must have lacked jurisdiction.

POINT II

The Bureau of Prisons is not constitutionally required to provide Orthodox Jewish prisoners with specially prepared, imported kosher meals on a daily basis during the period of their incarceration.

A. The Constitutional Standard

While it is true that incarceration does not and should not mandate the summary forfeiture of inherent individual constitutional rights, the retention of those rights must be

consistent with the person's status as a prisoner and ". . . the legitimate penological objectives of the corrections system". *Pell* v. *Procunier,* 417 U.S. 817, 822 (1974). It is sufficiently clear that any governmental infringement upon the right to freely exercise one's religion *outside of the prison setting* can only be justified by a "compelling state interest" in the regulation effectuated through the "least restrictive" alternative available. *Sherbert* v. *Verner,* 374 U.S. 398, 406-407 (1963). Only those religious practices that create "an administrative problem of such magnitude" so as to render an entire statutory scheme of regulation "unworkable" may legitimately be imposed upon in the *non-prison context. Id.,* at 409.

To the contrary, however, the prison setting is infused with a maze of considerations alien to the regulation of general society. The cases are legion which pronounce the necessary limitation and often justifiable retraction of privileges and rights that incarceration demands. *Price* v. *Johnston,* 334 U.S. 266, 285 (1948); *United States ex rel. Tyrell* v. *Speaker,* 471 F.2d 1197 (3rd Cir. 1973); *Cooper* v. *Pate,* 382 F.2d 518 (7th Cir. 1967); *Sostre* v. *McGinnis,* 334 F.2d 906 (2d Cir. 1964); *Childs* v. *Pegelow,* 321 F.2d 487 (4th Cir. 1963). But a greater tension develops when the rights at stake are of constitutional dimension. *Procunier* v. *Martinez,* 416 U.S. 396, 406 (1974). Hence, even though courts are in agreement with the notion that the prison setting presents a unique background against which first amendment claims must be analyzed, widely inconsistent approaches to the problem have emerged. Not only have courts applied several diverging standards, but they have been unable to precisely articulate and focus squarely on those factors necessarily relevant to an analysis of the restriction of personal liberties by the corrections system.[8]

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[8] Several courts have drawn upon the "compelling state interest," test developed in the *non-prison* context by the Court in *Sherbert* v. *Verner, supra,* focusing on the administrative burdens

[Footnote continued on following page]

Faced with the inconsistent "standards" and "tests" historically relied upon by the courts, the Supreme Court attempted in *Procunier* v. *Martinez,* 416 U.S. 396 (1974), "to determine the proper standard for deciding whether a particular [prison]regulation or practice . . . constitutes an impermissible restraint on first amendment liberties." *Id.*, at 412. Noting the interests intrinsic in the regulation of prisons—security, order, and rehabilitation—the Court articulated a two part test by which to judge the validity of such regulations: first, the regulation in question must further at least one of the enumerated "substantial governmental interests" and, second, the abridgement of first amendment freedoms may be no greater than necessary for the protection of the governmental interest(s) involved. *Id.* at 413.

Martinez ultimately turned on the fact that the rights of non-prisoners were involved, 416 U.S. at 408-409, and the Court found it impossible to sustain the regulation there challenged in view of the fact that it could "find no legitimate governmental interest to justify the substantial restrictions imposed. . . ." *Pell* v. *Procunier, supra,* 417 U.S.

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created by the unfettered exercise of "first amendment" rights. *E.g.*: *Ross* v. *Blackledge,* 477 F.2d 616 (4th Cir. 1973) (employing "paramount state interest test"); *Brown* v. *Peyton,* 437 F.2d 1228 (4th Cir. 1971) (applying "compelling state interest" test). Other courts have applied a standard of "reasonableness" in assessing the limitations imposed by prison officials. *E.g.*: *United States ex rel. Jones* v. *Rundle,* 453 F.2d 147 (3rd Cir. 1971) (inmates' rights to freely practice religion may be reasonably restricted in order to facilitate maintenance of discipline); X. (*Bryant*) v. *Carlson,* 363 F. Supp. 928 (E.D. Ill. 1973) (reasonable regulations necessary to the administration of a large population and discipline). Still others employ an even less restrictive standard in scrutinizing prison regulation of an inmate's religious practices. *E.g.*: *Childs* v. *Pegelow,* 321 F.2d 487 (4th Cir. 1963) (balancing of prisoners' religious rights against administrative necessity or convenience); *Sostre* v. *McGinnis,,* 334 F.2d 906 (2d Cir. 1964) (considering the practical limitations necessitated by the requirements of prison discipline).

at 826. The instant case, of course, involves only the rights of prisoners. *A fortiorari,* the standard of review applied in the instant case can be no more stringent than that employed in *Martinez* and the Court should restrict its inquiry to the questions of whether the refusal to provide the requested meals on a daily basis furthers the interests of prison security or order and whether the policy of the Bureau of Prisons to provide substitute foods and to allow prisoners to prepare their own meals in the Commissary represents the maximum accommodation which may be provided without sacrificing the interests sought to be protected in the first instance.

The district court hearin drew expressly on the *Sherbert* case (see n. 8, *supra*) and held that a "compelling state interest" test must be applied to appellee's claim, and that the "failure to make such food available would be permissible only if providing it created a seriously disruptive administrative burden (A. 191). Without serious consideration of the security, disciplinary, or rehabilitative interests at stake, the district court focused on narrow administrative considerations; *i.e.,* factors of cost and acquisition, which the Government never contended were themselves constitutionally sufficient to justify abridgment of first amendment rights. The evident flaw in this approach is the failure to recognize the very fundamental differences between the prison and non-prison setting. *Procunier* v. *Martinez, supra.*

The lower court herein, after declaring the propriety of using a "compelling state interest" test, reviewed the so-called Black Muslim cases and concluded that the courts generally cite a "compelling" test, but apply it with less rigor to claims in the prison context so as to account for seriously disruptive administrative burdens caused by first amendment demands (A. 197-198). It was the district court's position that this conclusion was in "general accord" with the standards and interests enunciated in

Martinez. It is the Government's position that the court below erred in drawing this conclusion, because the narrow focus below *on administrative burdens* (A. 191) is not within the intent of the Supreme Court as indicated by their decisions in *Martinez* and *Pell, supra*. Rather, proper analysis demands primary consideration of a prison's interest in security, discipline and rehabilitation, factors not present in a non-prison setting.

B. Bureau of Prisons Policies

Federal Bureau of Prisons Policy Statement 7300.43B states (in pertinent part):

> It is the policy of the Bureau . . . to extend to committed offenders the greatest amount of freedom of, and opportunity for pursuing, individual religious beliefs and practices as is consonant with the Bureau of Prisons mission—the correction of the committed offender. This must be accomplished within the context of the requirements of maintaining security, safety, and orderly conditions in the institution.
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> * * * * *
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> A committed offender may abstain from eating those food items, served to the general population, which are prohibited by the religion of the resident. The committed offender may receive added portions of non-rationed food items, from the main serving line, which in no way cause a violation of the restrictions of the faith professed by the committed offender. Ordinarily, the practical problems of institutional administration must be primary in arranging for the observance of religious . . . diets.

As indicated by the testimony and district court findings in *United States* v. *Huss and Smilow*, 72 Cr. 24 and 25 (S.D.N.Y., decided May 5, 1975), *vacated for lack of jurisdiction*, — F.2d —, Slip Op. 5121 (2d Cir., July 25, 1975),[9]

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[9] The district court took judicial notice of the testimony in *Huss and Smilow* (A. 62).

the Bureau of Prisons, in furtherance of its general policy of accommodating inmates' religious dietary requirements to the greatest extent possible without sacrificing security and discipline, has adopted the practice of allowing Orthodox Jewish prisoners to receive food from the "medical line", which serves such dietary supplements as eggs, cheese and canned fish, in addition to providing them with unlimited quantities of non-rationed items such as fruit jucies, milk, cereals, salads, fresh fruits and vegetables, coffee, tea, ice cream and pre-packaged cakes. Furthermore, upon request, an inmate will be assigned to the commissary staff, where he can observe how the food is prepared in order to satisfy himself *vis-à-vis* his dietary requirements and where he is permitted to prepare his own meals from the foods made available to him. If assigned to commissary duties, a prisoner can also receive, at the meal's end, extra portions of food meeting his dietary needs which was served to the general population. The Bureau will also provide an inmate with vitamin and mineral supplements, if necessary, in order to insure his well-being.

From the foregoing it is clear that an Orthodox Jew (or any other prisoner subscribing to special dietary practices for religious reasons) can fully exercise his religious dietary practices in a nutritionally adequate fashion without the importation into the prison of specially prepared "meals". As the district court in *Huss and Smilow, supra,* found, and food items supplements are available in plentiful supply which do not violate religious requirements and which, upon consumption, provide the necessary vitamins, minerals and calories required by the average prisoner without sacrificing or impinging upon the legitimate interests of the prison staff—the maintenance of security, order and discipline.

The federal courts have historically considered the availability of a nutritionally sound diet an important, often dispositive, factor in cases similar to that at bar. In *X.*

(*Bryant*) v. *Carlson, supra,* 363 F. Supp. at 931, the court specifically held that, inasmuch as sufficient nourishment could be obtained from those items of regular prison fare which satisfied the inmate's religious requirements, a special diet was not required. See, also, *Abernathy* v. *Commissioner,* 393 F.2d 775 (4th Cir. 1968).

Appellee herein, through his numerous applications to the district court, purports to seek the provision of "kosher food" during the period of his incarceration. In fact, what appellee actually seeks is the importation into the prison of frozen, foil wrapped kosher "meals" (which would have to be purchased from the few manufacturers throughout the country who prepare, package and market such meals), apparently because he is not satisfied with the dairy, juices, fruits and vegetables, etc. which would be available to him without suit. Since a nutritionally balanced and religiously permitted meal can be prepared from the latter (supplemented, if necessary, with pure vitamins and minerals as previously indicated), and since the Bureau of Prisons will accommodate appellee's interest in seeing that such foods as he may eat are properly handled in the kitchen, it is obvious that the pre-packaged meals sought by appellee are totally unnecessary for his well-being. Moreover, as appellee has admitted, if transferred to a traditional penal institution, he could easily accommodate the tenets of kashruth by eating regular prison provisions (A. 51). Accordingly, in view of the legitimate concerns of prison officials that providing such meals would disrupt security, order and discipline in the prisons (see discussion, *infra*), it is apparent that the Bureau is not constitutionally required to provide pre-packaged kosher meals to a prisoner such as appellee during the period of his incarceration.

C. Legitimate Interests of the Prison System

The position of the Bureau of Prisons policies concerning the accommodation of an inmate's religious dietary

practices was not the result of an impromptu analysis performed in a vacuum (or, for that matter, on an ad hoc basis solely for the purpose of establishing policy *vis-à-vis* Orthodox Jews or members of the Jewish Defense League). The testimony of Bureau officials in *Huss and Smilow* highlights the reasons for those policies: (1) problems of internal order and discipline; (2) problems of institutional security; (3) problems caused by the ultimate necessity of accommodating a multiplicity of religious dietary practices; and (4) problems of finances and related administrative considerations. It should be noted that the major concerns of the Bureau—security, discipline, and order—are those articulated by the Supreme Court in *Martinez* and *Pell, supra,* as the "legitimate" interests against which any analysis of first amendment claims in the prison context must necessarily be made. As the discussion which follows will demonstrate, the very real concerns of the Bureau with respect to the provision of pre-packaged kosher meals are more than justified and insulate its policies in this regard from constitutional challenge.

1. Internal order and discipline

As the Supreme Court noted in *Procunier* v. *Martinez, supra,* 416 U.S. at 412, and in *Pell* v. *Procunier, supra,* 417 U.S. at 826-827, of paramount importance in the management of any prison facility are matters of internal order and prisoner discipline. Historically, courts have taken a "hands off" approach towards these matters and consider them to be within the particular expertise of prison officials entrusted with the well-being and correction of the incarcerated offender. *Sostre* v. *McGinnis, supra,* 334 F.2d at 908, 911-912.

In this regard it must be noted that the prison setting presents a uniquely complex and emotionally charged atmosphere in which equality of treatment is imperative to the orderly day-to-day functioning of the institution and even rumors of "special" or "favored" treatment serve only

to cause resentment and friction. For example, the testimony in *Huss and Smilow,* judicially noticed below, by James Wahl, Director of Food Services for the Bureau of Prisons, was that one of the principal reas[illegible] underlying the challenged Bureau policies was the fear [illegible]t the provision of special meals to only a few prisoners would cause serious unrest throughout the involved facility. As a result, the Bureau strives to accommodate differing religious practices by relying on the regular "inhouse" menu of a given facility in the hope that this will eliminate (or at least minimize) and suggestion that one or more prisoners are being fed higher quality food than the others. Nevertheless, apparently because food is so common and basic to their prison existence, see *United States* v. *Shlian* (unreported decision), slip op. at 5 (E.D.N.Y., June 30, 1975), incarcerated offenders display extreme sensitivity to the slightest differential in menu offerings, thereby rendering the provision of "special", *i.e.,* different and, therefore, presumably better, food a source of potential explosion by the inmates not so favored. Adding to the entire problem are the complex and close questions of civil and ecclesiastic law which may compel the provision of "outside" food to one "religious" prisoner but not another; such distinctions simply cannot be appreciated by the general population of our prisons.

Sadly enough, what may have once been mere conjecture in this regard (and, therefore, possibly insufficient to sustain the challenged regulations) is now stark fact. Louis J. Gengler, Warden of the Federal Detention Headquarters in New York, who testified before the district court below with respect to an experiment conducted at the West Street detention facility in which one detainee was provided with frozen kosher meals without incident (A. 117-118), also testified before the district court in *Huss and Smilow, supra.* His testimony in that case is most revealing, for he completes the narrative begun below by explaining that when the initial experimentation, *supra,* appeared to present no

serious problems, prison officials decided to provide kosher food to a second inmate. Unfortunately, several prisoners then incarcerated at West Street strenuously objected to what they viewed as "special" treatment; they threatened the facility's food administrator and ultimately attacked and seriously injured the inmate receiving "favored" treatment, who required hospitalization. Prison officials thereafter kept him in "protective" custody and subsequently had to transfer him to another institution because "his life was in jeopardy." This incident vividly conveys the realities against which the Bureau policies must be judged.

Warden Gengler also testified in *Huss and Smilow* with respect to two similar incidents in which differential treatment (in an effort to accommodate religious practices) resulted in disruptive violence. To suggest that the solution to such problems lies in punitive action against belligerent inmates is, at best, extremely short-sighted. Sincere grievances, whether real or simply perceived, often underlie these unfortunate incidents and as previously explained, the disturbed inmates frequently cannot appreciate the subtle differences between religious sects and the intricacies of civil and canon law which might compel differing results for different inmates, all of whom claim to be "religious". This is not to suggest that punitive measures have no place or that they are not, in fact, effected when incidents such as those testified to by Warden Gengler occur. They must, however, be coupled with a well thought out *preventive* policy to minimize the disruption visited on a prison facility by both violence (or the threat of violence) and the ensuing punishment. We submit that the policy challenged herein is just such a preventive policy and ought to be sustained by the court.

In this regard, we believe the teaching of the Supreme Court in *Saxbe* v. *Washington Post Co.*, 417 U.S. 843 (1974), to be of some significance. In *Saxbe*, the district court had directed that determinations be made on a

prisoner-by-prisoner basis with respect to press access to inmates who had been the subject of such expansive news coverage that they gained unusual notoriety among their fellow inmates and often became the source of disciplinary problems. The Court rejected this approach, however, noting that a selective policy would itself spawn disciplinary problems by engendering hostility and resentment between inmates. 417 U.S. at 849.

Because the unique dynamics of the prison setting demand as equal treatment of all prisoners as possible, the Bureau has formulated the policies and practices here claimed to be constitutionally defective. The essentially *theoretical*[10] challenge to those policies and practices cannot, however, overcome the very practical, real and legitimate concerns of the Bureau of Prisons with respect to order and discipline, concerns which mandate a reversal of the district court herein. To do otherwise will only serve to aggravate existing tensions and will, undoubtedly, beget unnecessary disorder in any institution in which appellee (or any other prisoner deemed entitled to "special" food for religious reasons) is housed.

2. Institutional security

As indicated in the testimony adduced in *Huss and Smilow, supra,* all supplies transported into a prison are subjected to elaborate screening as a security measure; both the transporting vehicle and the supplies themselves must be thoroughly inspected. The regular importation of the *sealed* packages sought by appellee herein, besides necessitating additional inspections, will undoubtedly give rise to unique problems. Because it will be obvious to all involved in the shipment and delivery of the packages to the facility where appellee is incarcerated that the same are

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[10] *Huss and Smilow, supra,* — F.2d —, Slip. Op. at 5133; *United States* v. *Schlian,* Slip. Op. at 2-3 (E.D.N.Y June 30, 1975).

destined to be served, *unopened*, to him, the chances that a weapon or other contraband will be smuggled in, or that he will be poisoned, will be greately and unnecessarily increased. The fact that such packages cannot be opened by anyone other than the ultimate users without rendering the contents unkosher (A. 102-108) will mean that it will be virtually impossible to subject the contents of such a package to a serach before it is heated (presumably, by appellee) in the kitchen ovens and opened for eating. The foregoing problems will, of course, be exacerbated if, as suggested at one point below, the sealed platters are "donated" by sympathetic supporters of appellee (or any other inmate). Therefore, we submit that the Bureau of Prisons' paramount and legitimate interest in prison security, an interest specifically approved in *Pocunier* v. *Martinez*, *supra*, as a basis upon which inmates' first amendment liberties may be regulated, establishes a sufficient basis, both in and of itself and in conjunction with the other factors discussed herein, upon which to sustain the challenged regulation.

3. The ultimate necessity of accommodating every religious group represented in the general prison population.

Any mandate requiring the Bureau of Prisons to accommodate appellee's specific religious dietary preferences by providing him with imported meals to substitute for regular prison fare on a day-to-day basis would constitutionally and practically necessitate the accommodation of every religious dietary practice represented among the general prison population, regardless of the number of inmates adhering to a particular creed, or else risk running afoul of the Establishment Clause. *Everson* v. *Board of Education*, 330 U.S. 1, 15 (1947).

The district court below attempted to summarily dispel the predictable problem of a multiplicity of demands by suggesting that when prison officials are faced with what

they believe to be a spurious claim to individualized treatment, they may require a demonstration that the claimant is a *bona fide* adherent of a *bona fide* religion (A. 201). The problems inherent in this approach are two: Firstly, it is constitutionally distasteful and practically difficult to determine just who is and who is not a *bona fide* adherent of a *bona fide* religion; presumably, to make such a decision, the Bureau of Prisons would have to almost always inquire into the the religious background of the claimant and, in the case of the lesser known religions, into the background of the sect itself. The Bureau is ill-equipped to make such determinations, which are far outside its sphere of competency.

Secondly, assuming such decisions were made, the Bureau's ability to remand committed offenders to certain institutions (or to transfer them between institutions) might well be adversely affected, since a prisoner might have to be housed in a particular facility on the basis of the availability of certain foods, rather than on the basis of what is needed for the rehabilitation of that person. This is not a hypothetical problem. In the case at bar, the Bureau has had to maintain appellee at a halfway house facility in order to comply with the order appealed from. Thus, whatever opportunity the Bureau might have had to rehabilitate appellee has been effectively abrogated.

The challenged policy, of course, avoids these problems while to a large degree accommodating almost all religious dietary practices, including appellee's, since adequate amounts of nutritionally balanced, acceptable diets are provided by the Bureau at all of its facilities. Thus the Bureau need not test the sincerity of an inmate's religious beliefs, or the *bona fides* of his sect, and can assign or transfer any inmate to any institution with the knowledge that his rights will not be infringed upon while those of society are vindicated.

4. Financial considerations

Independent of any acquisition or transportation costs, the increased expenditures necessitated by the requested purchase of frozen kosher meals is significant. As the testimony in *Huss and Smilow* established, the Bureau of Prisons operates within the parameters of a fixed Congressional appropriation. In fiscal 1975, it spent an average of $1.38 per day per inmate on food. The comparative costs of providing the kosher meals sought herein is estimated to be between $3.50 and $5.00 *per meal,* or at least 10 times as much as the food provided to the other inmates (without including the cost of prison food, such as juice, eggs, fruit, and vegetables, which appellee would still be provided with).

It is true that at present only a very few inmates would seem to "qualify" for the provision of kosher food as contemplated by appellee and the court below. Thus it would appear at first blush that there is some merit to the argument that the comparison made in the preceding paragraph is unfair inasmuch as the overall impact of providing kosher food would be *de minimis.* This counter-argument, however, overlooks an important point.

No one really knows how many Jews are imprisoned and how many would seek kosher food if given the opportunity. Assuming, as was suggested below, that there are perhaps a dozen in all, it would cost the Bureau at least an additional $50,000 per year just to provide those 12 with the relief requested by appellee herein. Moreover, as more and more inmates avail themselves of the "right" to demand specialty meals on the basis of their religious beliefs and practices, the cost to the Bureau will undoubtedly rise substantially, with the primary and most unfortunate effect of strapping the resources of the Bureau and hampering its legitimate efforts in the areas of rehabilitation and counseling, to name but two.

It must be emphasized that it is not our position that the present or future cost factors alone are dispositive of appellee's claim. They are, however, important factors which must be considered by the Court along with the far more compelling reasons advanced above for sustaining the challenegd policies. *Walker* v. *Blackwell,* 411 F.2d 23, 26 (5th Cir. 1969).

5. Alternative means of accommodating appellee

In view of *Procunier* v. *Martinez, supra,* 416 U.S. at 413, only the "least restrictive" means may be employed by the Bureau of Prisons in regulating the first amendment rights of inmates in furtherance of legitimate penal interests. It is thus necessary to discuss at this juncture the two alternatives mentioned below.

The suggestion that appellee be permitted to purchase his own kosher meals while incarcerated must fail, for the proposal solves nothing but the cost problem faced by the Bureau were it to provide the meals itself. Resentment will still be generated among other inmates, especially those who could not afford to buy their own meals if given the opportunity. Moreover, the problems of security would still exist. Thus the idea that appellee provide himself with the meals sought must fail, for it does not comport satisfactorily with the legitimate interests of the prison system. *Procunier* v. *Martinez, supra.*

Similarly, the suggestion that local or national Jewish community groups donate the meals sought to the prison system (A. 199) solves only the cost problem and it, too, must fail. Moreover, this proposal carries with it the substantial risk that appellee's followers, acting through the medium of a sympathetic group, would attempt to smuggle a weapon or other contraband into prison.

It would thus appear that the regulatory scheme devised by the Bureau of Prisons, and here challenged as unconstitutional as applied to appellee, is, in fact, the least restrictive means of advancing and protecting the legitimate

institutional interests of the Bureau and, on that basis, should be upheld.

D. Summary

It cannot be overemphasized that the policy of the Bureau of Prisons is to provide appellee, and others similarly situated, with kosher food, but not to purchase special pre-packaged kosher "meals" for appellee. In furtherance of this policy the Bureau will allow appellee access to extra portions of non-rationed kosher items, to kosher food regularly available on the medical line, and to the kitchen itself if necessary. The effect of thees practices will be to afford appellee a nutritionally sound kosher diet throughout the period of his incarceration without sacrificing security, order or discipline.

To the extent that the district court regarded the latter concerns as minor practical problems of no real constitutional significance (A. 200), it has approached the problem as if presented in the non-prison context. Thus, the assertion below that such meals are readily available to airlines, railroads, hospitals and hotels (A. 199-200) and the conclusion based thereupon that they should be equally readily available in prison belittles the legitimate concerns of the penal system contrary to the approach articulated in *Procunier* v. *Martinez, supra,* and *Pell* v. *Procunier, supra.* Such civilian enterprises are not normally concerned with the security and discipline of their establishments and patrons.

Accordingly, the United States submits that the challenged practices represent the least restrictive means available for the protection of its legitimate and proven interests, that they are, therefore, constitutionally sound, and that the court below erred in holding otherwise.

CONCLUSION

For all of the reasons hereinabove stated and on the basis of the record below, the order of the district court should be reversed.

Dated: August 11, 1975

Respectfully submitted.

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LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 10th day of September 1975 he served ~~a copy~~ two copies of the within

Brief for the Appellant

by placing the same in a properly postpaid franked envelope addressed to:

Barry I. Slotnick, Esq.
233 Broadway - 44th Floor
New York, N. Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
10th day of September 1975

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977